(2)

No. 91-371

In The

Supreme Court of the United States

October Term, 1991

TAMPAM, INC.,

Petitioner,

vs.

OGLE COUNTY BOARD OF REVIEW, SUPERVISOR OF ASSESSMENTS FOR OGLE COUNTY, COUNTY TREASURER OF OGLE COUNTY, also acting as Collector of Taxes, and THE COUNTY OF OGLE,

Respondents.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois Second Judicial District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should deny the writ where the Illinois courts properly decided that Petitioner's legally and factually distinct public roads claim was never viable under 42 U.S.C. §1983, and that hours spent on this unrelated claim must be eliminated from the lodestar computation?

2. Whether this Court should deny the writ where the Illinois courts properly decided that this court should deny the writ where the Illinois courts properly determined that the forum rate provided a reasonable rate of compensation for Attorney McMillen.

3. Whether this Court should deny the writ where the Illinois courts properly decided that this court should deny the writ where the Illinois courts properly rejected Plaintiff's Petition for a 50% upward enhancement and properly decided to reduce the McMillen and Nye lodestars to reflect the amounts involved and the results obtained.

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JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated more fully by the argument contained herein, Respondents do not believe Petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the writ.

STATEMENT OF THE CASE

Respondents respectfully suggest that this Court disregard Petitioner's statement of the case. First of all,

Petitioner does not cite to the record as required by Rule 14.1(h). Secondly, Petitioner, in its statement of the case which is for factual material and not argument, attempts to color or even mislead the Court via certain statements. Specifically, the Petitioner alleges that its administrative appeal to the Property Tax Appeal Board granted no relief. (Petition for Writ at 9). Petitioner fails to tell the Court that Tampam, Inc. failed to appear at the hearing which was scheduled to hear evidence as to why the assessment by the Ogle County Board of Review was incorrect. In fact, Petitioner even failed to appear at the hearing by the Ogle County Board of Review where Tampam, Inc. should have provided evidence as to why the assessment of its property was allegedly incorrect.

Additionally, the Petitioner concludes that assessment procedures "constituted the assessor's intentional pattern and practice throughout Ogle County, Illinois . . . " (Petition at 10). As we argued at the Appellate Court of Illinois, Second District, and as the Court found, "there is nothing in the record to show clear and intentional discrimination." (See Appendix A, page 24 of the Petition).

Also on pages 10 and 11 in Petitioner's statement of the case, it states that its "roads claim" was a violation of 42 U.S.C. Section 1983. The trial court decided that "[t]he public-roads challenge was never viable under section 1983, . . . " (R. C-379). This conclusion was also affirmed by the Appellate Court of Illinois, Second District. (See Appendix A, page 22 of the Petition).

While the Petitioner may be correct when it says that Tampam, Inc.'s home office, business files, and officers

and directors were located in the Chicago area (Petition at page 11), it is likewise true that *inter alia*, the corporation owned real estate, transacted business, and paid taxes in Ogle County, Illinois.

In addition to Petitioner's contention that local counsel from Ogle County was employed for routine court appearances and filings (Petition for Writ, page 11), local counsel Philip H. Nye, Jr. of Fearer, Nye, Ahlberg & Chadwick, filed the original complaint which initiated this litigation (R. C-11) and remained involved in the litigation until the trial court proceedings had been concluded.

Lastly, Petitioner's statement of the case is argumentative and should be disregarded. For example, Petitioner alleges that the court's determination that $14,872 represented a reasonable attorneys' fee was "founded upon an erroneous reading of the law and of the pleadings in the case." (Petition at 13).

In lieu of Petitioner's statement of the case, we respectfully suggest that the Court consider the following as a more reliable statement of the case.

RESPONDENTS' STATEMENT OF THE CASE

The Plaintiff, Tampam, Inc., an Illinois Corporation, initiated this litigation as an administrative appeal of the 1986 real estate tax assessments levied against its Ogle County farmland. After the Ogle County Board of Review and the Property Tax Appeal Board of Illinois upheld the

assessments, the Plaintiff filed a complaint (R. C-11) seeking judicial review pursuant to the Illinois Administrative Review Act. The complaint was filed on January 8, 1988, by Philip H. Nye, Jr., of the Ogle County bar. Subsequent to Defendant's Motion to dismiss Petition for Administrative Review (R. C-21) and Motion to Strike (R. C-24), Attorney Thomas R. McMillen of the Cook County bar, filed an appearance. (R. C-28). Attorney McMillen also happens to be the president and principal stockholder of the plaintiff corporation, Tampam, Inc. (R. C-370) (hereinafter, Tampam).

On June 3, 1988, Tampam filed an amended complaint (R. C-52) which alleged that public roads and highways which lie within the legal description of its property, and other land of no agricultural economic value were being improperly assessed and taxed by Ogle County authorities. Additionally, Tampam sought certification as the representative party of all Ogle County farmers who were similarly situated. The Ogle County Board of Review was added as a defendant.

Count I of the Amended Complaint sought monetary relief as well as preliminary and permanent injunctive relief against the assessment, collection and disbursement of improper farm taxes. Included in Count I was, for the first time, a claim for relief pursuant to the Federal Civil Rights Act of 1871 (42 U.S.C. §1983).

Tampam's request for judicial review of the administrative appeal was now contained in Count II of the Amended Complaint.

On September 12, 1988, Tampam filed a Motion for Preliminary Injunction. (R. C-119). The Court conducted

an emergency hearing on the motion on September 15, 1988, and issued an Order (R. C-136) denying the Plaintiff's Motion for Preliminary Injunctive Relief and a Memorandum Opinion. (R. C-138).

On October 24, 1988, with leave of Court, Tampam filed a Seconded Amended Complaint. (R. C-154). Now the County of Ogle was a defendant and to Count I was added an allegation that defendants had not debased the value of farmland which contained fields of irregular size and shape.

After a hearing, the Court certified Tampam as class representative for " . . . all owners of farms in Ogle County, Illinois, contained wasteland . . . " and dismissed the Ogle County Treasurer from the suit but retained jurisdiction to implement relief which may be granted against other defendants. (R. C-270).

Plaintiffs and Defendants presented a Stipulation for Settlement (R. C-278) to the Court on May 2, 1989. The Court entered an Order Approving Stipulation for Settlement (R. C-281) on the same day. The stipulation for settlement as well as the Order were drafted by Attorney McMillen. The third paragraph of the Order (*Id.*) provides, "And the Court finding that said Stipulation fairly and reasonably settles *all* matters now in dispute between the respective parties, with the exception of Plaintiff's attorney fees and costs;" (emphasis added).

The Court ruled that Tampam had abandoned the "debasement" issue. (R. C-373).

On June 30, 1989, Tampam filed its Petition for Fees and Expenses. (R. C-289). The petition claimed that Attorney McMillen was entitled to compensation from defendants based on 161.25 hours valued at $190.00 per hour while employed at Bell, Boyd and Lloyd, a Chicago, Illinois, lawfirm. This amounted to $30,637.25. During the pendency of this matter, McMillen left Bell, Boyd and Lloyd and opened an office as a sole practitioner. McMillen claims that he worked 84.5 hours at an hourly rate of $150.00 which results in an additional $12,675.00 for a total of $43,312.25. Tampam provided affidavits from Chicago attorneys that these hourly rates were appropriate for McMillen's work based upon their knowledge of the Chicago market area. Tampam's petition next requested a 50% enhancement of this fee resulting in the total claimed for McMillen as $64,968.75.

An associate at Bell, Boyd and Lloyd, Ms. Suizzo, claimed 31 hours at $85.00 per hour for a total of $2,635.00.

Corresponding attorneys, Fearer, Nye, Ahlberg and Chadwick, of the Ogle County bar submitted a fee request based upon $95.00 per hour and an itemized expense record for a total of $6,140.91. (R. C-298). The total of fees and expenses which the plaintiff sought from the defendants amounted to $74,693.91.

In July, 1989, the Court conducted a hearing on Plaintiff's Petition for Fees and Expenses. The defendants conceded that Tampam had achieved sufficient relief, albeit not total relief, to qualify as a prevailing party, and was, therefore, entitled to recover a reasonable fee. However,

defendants argued that the amount requested was unreasonable. The court entered an Order Awarding Attorneys' Fees and Expenses (R. C-367) and a Memorandum Opinion. (R. C-369). The Court found that Tampam's wasteland issue presented a substantial section 1983 claim even though no opportunity was available to prove the allegation because the parties decided to settle before trial. This finding warranted the recovery of attorneys' fees. (R. C-379).

However, the Court held that "[t]he public roads challenge was never viable under section 1983[.]" (*Id.*) The Court also concluded that the public roads issue was legally and factually distinct from the wasteland claim. The Court determined that at least 35% of the hours expended by Tampam's attorneys were attributed to the public roads issue and excluded them from the lodestar computation. (R. C-381).

The Court next determined that the reasonable hourly rate for Attorney McMillen was $95.00 per hour – the same as for Tampam's Ogle County attorney who has been a general partner in the firm of Fearer, Nye, Ahlberg and Chadwick for more than 25 years. (R. C-382). Attorney Nye submitted an affidavit stating that $95.00 represented "the usual and customary charge for legal services of a like nature in Ogle County, Illinois." (R. C-335).

Attorney John B. Roe, also a member of the Ogle County bar, submitted a supporting affidavit which stated that the hourly rate of $95.00 "is consistent with that of other senior attorneys in Ogle County with comparable skill and seniority who engage in litigation practice." (R. C-336).

After multiplying what the Court determined to be a reasonable number of hours expended on this matter times the reasonable hourly rates, the lodestar was calculated to be a total of $18,672.15. (R. C-383).

The Court found that the exceptional success required to support Tampam's requested upward enhancement was "clearly not present, for the lodestar provide[d] more than adequate compensation". Based upon the amounts involved in the case and the results obtained, the Court reduced $3,000.00 from McMillen's compensation and $800.00 from Nye's. The defendant, Ogle County, was then ordered to pay a total award of $16,345.91. (R. C-384).

Following Plaintiff's Supplemental Petition for Fees and Expenses (R. C-411) and a hearing on the same, the Court entered a Modified Order Awarding Attorneys' Fees and Expenses (R. C-473.). The Court applied the same process as before and increased the total award to Plaintiff to $18,173.79. (R. 475).

Tampam filed a notice of appeal to the Appellate Court of Illinois, Second District, on April 19, 1990. The court, in a published opinion, *Tampam, Inc. v. Property Tax Appeal Board, et al.* (3d Dist. 1991) 208 Ill. App. 3d 127, 566 N.E. 2d 905, affirmed the decision of the trial court in all respects.

Tampam's subsequent petition for leave to appeal to the Illinois Supreme Court was denied on June 5, 1991 and its Petition for Writ of Certiorari to the Appellate Court of Illinois, Second Judicial District was filed with the Clerk of the United States Supreme Court on September 3, 1991.

STANDARD OF REVIEW

Since "the [trial] court [possesses] superior understanding of the litigation and the desirability of avoiding appellate review of what are essentially factual matters", *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), it is within the Court's sound discretion to determine the amount of the fee award. *Id.*

> If ever there was a case for reviewing the determinations of a trial court under a highly deferential version of the "abuse of discretion" standard, it is in the matter of determining the reasonableness of the time spent by a lawyer on a particular task in a litigation in that Court. Not only is the trial court in a much better position than the Appellate Court to make this determination, but neither the stakes nor the interest in uniform determination are so great as to justify microscopic appellate scrutiny.

Ustrak v. Fairman, 851 F.2d 983, 987 (7th Cir. 1988). (quotes in original).

ARGUMENT

I. THIS COURT SHOULD DENY THE WRIT WHERE THE ILLINOIS COURTS PROPERLY DECIDED THAT PETITIONER'S LEGALLY AND FACTUALLY DISTINCT PUBLIC ROADS CLAIM WAS NEVER VIABLE UNDER 42 U.S.C. §1983, AND THAT HOURS SPENT ON THIS UNRELATED CLAIM MUST BE ELIMINATED FROM THE LODESTAR COMPUTATION.

Tampam's counsel conceded that even though easements over which county and township roads pass

through its property are within its legal boundaries, the county taxing authorities have given the easements a "zero" value. (R. C-145). It is the *procedures* by which the widths of certain easements or rights-of-way were calculated that are in dispute. (*Id.*, see also R. C-371). As the Court observed, if Tampam had a constitutional claim on this issue, it must be as a violation of due process. (R. C-380).

> However, whereas "[w]e have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest,'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985) (citation omitted), it is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. (citations omitted).

McKesson v. Division of Alcoholic Beverages & Tobacco, ___ U.S. ___, 110 Sup. Ct. 2238, 2250 (1990). (emphasis in original).

Where state law provides adequate post-deprivation remedies, due process has not been denied; and therefore, cannot be the basis for a §1983 action. *Beverly Bank v. Board of Review of Will County*, (3d Dist. 1983), 117 Ill.

App. 3d 656, 663, 453 N.E. 2d 96, 101, *cert. denied*, 466 U.S. 951.

In *Beverly Bank*, the plaintiff brought suit under 42 U.S.C. §1983 and alleged that the Board of Review increased real property assessments without affording class members a statutorily required hearing. As in the case at bar, the plaintiff alleged that the defendants had violated State law as well as denied them equal protection and due process pursuant to the Fourteenth Amendment of the Constitution of the United States. The *Beverly Bank* court held that although the action of the Board of Review was illegal under State law, the plaintiffs were not deprived of their property without due process of law because exactly that type of arbitrary action by taxing officials can be corrected by pursuing the remedies which the state provides. (*Id.*) Accordingly the Court affirmed the trial court's dismissal of the due process claim. In the case at bar, the trial court similarly found that an adequate post-deprivation remedy existed and, therefore, Tampam's public roads due process claim had to fail. As the *Beverly Bank* court quoted:

> These decisions do not amount to a requirement of exhaustion of administrative remedies as a predicate to a section 1983 claim. Rather, they express the logical propositions that a State cannot be held to have violated due process requirements when it has made procedural protection available and the plaintiff has simply refused to avail himself of them.

Id. quoting *Dusanek v. Hannon*, 677 F.2d 538, 543 (7th Cir. 1982).

As pointed out in Respondent's Statement of the Case, Tampam, Inc. initiated this litigation as an administrative appeal of the 1986 real estate tax assessments levied against its Ogle County farmland. The Ogle County Board of Review scheduled a hearing at which the Plaintiff could have presented evidence and argument as to why it believed that its farmland had been incorrectly assessed. Plaintiff failed to appear at the hearing and, hence, his appeal was denied. Plaintiff next appealed for relief from the Property Tax Appeal Board of Illinois. Once again a hearing was set for Plaintiff to present evidence and argument and, once again, Plaintiff failed to appear. Plaintiff's appeal was thus denied after which Plaintiff filed a complaint seeking judicial review.

Here, Plaintiff was afforded an adequate post deprivation remedy of which it failed to avail itself. Therefore, even if Plaintiff's assessment may have been incorrect, it was not deprived of property without due process of law.

"[T]he State's action is not complete until and unless it provides or refuses to provide a suitable post-deprivation remedy[.]" *Hudson v. Palmer*, 468 U.S. 517, 534-36 (1984). The court in *Hudson*, just as the court in the case at bar, found that the plaintiff's due process rights were not violated because the State provided an adequate post-deprivation remedy. *Id.*

The Court in *Beverly Bank* noted that plaintiffs had stated a §1983 cause of action, vis-a-vis its equal protection claim. It, therefore, remanded the case back to the circuit court for trial. A denial of equal protection requires more than misinterpretation of the law or even

application of the law in an arbitrary manner. The complaining party must prove that the alleged discrimination was intentional or purposeful. *Beverly Bank*, 117 Ill. App. 3d at 66[illegible], 453 N.E. 2d at 101. Applying this principle to the case at bar, because the parties settled this matter before trial on the merits, the court made no findings that the defendant either intentionally or purposefully discriminated against Tampam. Additionally, the settlement agreement did not stipulate that such was the case. Therefore, Tampam's allegation of an equal protection violation must also fail. Just as the due process claim could not serve as the basis of a §1983 action, neither can this unsuccessful equal protection claim.

Even where, as here, claims based on different facts and legal theories are advanced against the same defendants, work on unrelated, unsuccessful claims by counsel for prevailing parties requires that such claims be considered as if they had been raised in separate lawsuits. Accordingly, no fee is to be awarded for time pursuing the unsuccessful claims. *Hensley v. Eckerhart*, 461 U.S. 424, 434-435 (1983). The Court in the case at bar concluded that the public roads issue was never a viable §1983 claim. (R. C-381). Additionally, the court concluded that the claim was factually and legally distinct from the wasteland claim, and therefore, not properly compensable under §1988 in this case.

While the *Hensley* court held that legal services expended in pursuit of related claims, although unsuccessful, may be compensable, a plaintiff is not to be reimbursed for attorneys' fees which are allocated to factually unrelated, unsuccessful claims. *Lenard v.*

Argento, 808 F.2d 1242, 1245-56 (7th Cir. 1987), *Ustrak v. Fairman*, 851 F.2d 983, 988 (7th Cir. 1988).

The method by which county officials calculate the width of public roadways that pass through farm owners' property is factually and legally distinct from an allegation that county officials did not properly apply statutory requirements when assessing wasteland.

Because it is impossible to identify with precision the amount of time spent in pursuit of the unrelated and unsuccessful claims, the court is to use its best estimate of the time counsel would have expended on the successful claim(s) had the suit been restricted to the ground on which he prevailed plus related claims within the meaning of *Hensley*. *Ustrak*, 851 F.2d at 988-989. The court's best estimate as to the time expended by Tampam's attorneys was that no more than 65% of the hours claimed could be reliably attributed to the successful wasteland claim including all issues through which it straddled. (R. C-381).

From the foregoing, the court properly reduced Tampam's attorneys' hours and calculated the lodestar based on 198.67 hours worked.

At page 19 of the Petition for Writ of Certiorari, it is alleged that the Stipulation for Settlement (R. C-278) was only for a partial settlement of the class action. We strongly disagree. On May 2, 1989, the trial court entered an Order Approving Stipulation for Settlement (R. C-281). The Order said, "And the Court finding that said Stipulation fairly and reasonably settles *all* matters now in dispute between the respective parties, with the exception of Plaintiff's attorney fees and costs; . . . " *Id.* (emphasis

added). Additionally, the Petitioner itself, in its Plaintiff's Petition for Fees and Expenses (R. C-289), states that after it prepared and the Court approved a Notice to be sent to the class members, " . . . the attorney's services on the merits of the Complaint were *concluded.*" *Id.* at C-293. (emphasis added).

Contrary to Petitioner's assertion at page 30 of the Petition for Writ, the Ogle County State's Attorney did not proffer an offer of settlement in this case. Instead, it was the Petitioner who made the offer of settlement and the record documents this by the words of Petitioner's own counsel. Counsel writes, " . . . the defendant's (sic) attorneys reconsidered their opposition to *plaintiff's* offer of settlement." (emphasis added). The primary reason to point this out is to demonstrate yet another attempt by Petitioner to color the facts and the law to the point of possibly misleading the Court.

Petitioner incorrectly asserts that the only attorneys with an office in Ogle County and an a.v. rating in Martindell's (sic) was the local counsel, Philip H. Nye of the law firm of Fearer, Nye, Ahlberg and Chadwick. Other Ogle County attorneys with such designation include Moehle, Smith & Nieman; Fearer, Nye, Ahlberg & Chadwick; Williams & McCarthy; David K. Guest; William Barrick; and Robert Gosdick.

This argument by Petitioner, nonetheless, should be disregarded because it was not in the record below. However, even if the Court chooses to allow it, §1988 speaks not a word about plaintiffs choosing between rated and

non-rated attorneys in a publication by Martindale-Hubbell. Additionally, there is not a scintilla of judicial interpretation that lends any credence or weight to Petitioner's weak argument. In fact, Attorney McMillen, a former United States District Court Judge for the Northern District of Illinois, was the trial judge in the case of *Lenard v. Argento*, 808 F. 2d 1242 (7th Cir. 1987). The Seventh Circuit in *Lenard* said that §1988 allows only a reasonable fee. This means one which is large enough to attract competent counsel to represent plaintiffs, but no larger. *Id.* at 1247. Citing to H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8-9 (1976); S. Rep. No. 1011, 94th Cong., 2d Sess. 5-6 (1976); U.S. Code Cong. & Admin. News 1976, p. 5909; *City of Riverside v. Rivera*, 477 U.S. 561 (1986).

Again, in an attempt to subliminally mislead this Court, Petitioner states that the trial court appointed plaintiff's metropolitan attorneys to represent the class (see Petition at 11, 30). We acknowledge that the court appointed Tampam to represent the class of plaintiffs designated in the Second Amended Complaint (R. C-154). However, a distinction must be made between being appointed to represent the class and an appointment as the legal representative of the class. Here, the court did not appoint attorney McMillen as be the attorney for the class.

Attorney McMillen, on behalf of the Petitioner, accuses the trial court of deciding how much this case was worth at or before the time the Petition for Attorneys' Fees was presented. (Petition for Writ at page 31) and then devising a scheme by which it could achieve its objective. This assertion is absolutely ludicrous and there

is not a shred of evidence in the record to support this unwarranted accusation. Furthermore, it is clear from the scholarly Memorandum Opinion (R. C-369) prepared by the Court that it spent a great amount of time in deciding the attorneys' fees issue in this case.

As a minor point, but to once again correct the Petitioner, the court did make citation to *Chrapliwy v. Uniroyal, Inc.*, 670 F. 2d 760 (7th Cir. 1982) *cert. denied*, 461 U.S. 956 (1983), (R. C-383), contrary to the allegation in the Petition for Writ of Certiorari at page 33.

II. THIS COURT SHOULD DENY THE WRIT WHERE THE ILLINOIS COURTS PROPERLY DETERMINED THAT THE FORUM RATE PROVIDED A REASONABLE RATE OF COMPENSATION FOR ATTORNEY MCMILLEN.

Reasonable fees under §1988 are to be determined by the prevailing market rates in the *relevant* community. *Blum v. Stenson*, 465 U.S. 892, 896 (1984) (emphasis added). A majority of the Circuit Courts of Appeal have adopted the forum as the presumptively relevant community for purposes of determining the prevailing market rate for attorneys' fees. (See *In Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983); *In re Agent Orange Product Liability Litigation*, 818 F. 2d 226, 232 (2nd Cir. 1987); *Chrapliwy v. Uniroyal, Inc.*, 670 F. 2d 760, 768 (7th Cir. 1982) *cert. denied*, 461 U.S. 956 (1983); *Avalon Cinema Corp. v. Thompson*, 689 F. 2d 137, 140 (8th Cir. 1982); *Donnell v. United States*, 682 F. 2d 240, 252 (D.C. 1982)).

The proper forum for suit in this case was Ogle County since the situs of the property is here. The court

in its discretion, may decide that the local rate is reasonable where an out-of-town attorney provides legal services which local attorneys could do as well. *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768 (7th Cir. 1982) *cert. denied*, 461 U.S. 956 (1983). Tampam reads *Chrapliwy* to mandate that the attorney's own rate, not the forum rate, must be applied to the lodestar. We strongly disagree. In *Chrapliwy*, the trial court was reversed for limiting the recovery of plaintiff's attorney's fees to rates in the locality where the court sat. The Seventh Circuit, on review, emphasized that the defendant had invited the use of high-priced, out-of-town attorneys by its own use of similarly expensive non-local attorneys. Additionally, in that case, the trial court did not make a finding that local counsel with the requisite expertise were available to try plaintiff's case. If the court believes that services of equal quality were available at a lower rate in the area where the services were provided, then the judge has discretion to challenge the reasonableness of the out-of-town attorney's billing rate. *Chrapliwy*, 670 F.2d at 769.

In this case, Tampam submitted affidavits as to the value of McMillen's services in the Chicago area. Additionally, Tampam submitted affidavits from two senior members of the Ogle County Bar. Attorney Nye, who filed the original complaint on behalf of Tampam in this matter and continued to be involved until settlement was reached, submitted an affidavit stating that his usual and customary rate for legal services of a like nature is $95.00 per hour. (R. C-334-335). Attorney John B. Roe submitted an affidavit (R. C-336-337) which supported Attorney Nye's $95.00 per hour rate stating that it was consistent

with other senior litigators with comparable skill and seniority within Ogle County.

In addition to the affidavits presented, the court may utilize its own knowledge of prevailing rates in the area. *Lightfoot v. Walker*, 826 F.2d 516, 524 (7th Cir. 1987).

The court made a specific finding that many of the local attorneys could have easily handled this straightforward tax case. Few, if any, would have been reluctant to pursue the matter on behalf of Tampam. Other jurisdictions permit plaintiffs to receive the higher out-of-town rates where it is demonstrated that plaintiff was unable to retain local counsel despite diligent, good faith efforts. *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140-141 (8th Cir. 1982) quoting *Donaldson v. O'Connor*, 454 F. Supp. 311, 315 (N.D. Fla. 1978). See also *Donnell v. U.S.*, 682 F.2d 240, 251 (D.C. Cir. 1982). Tampam provided no evidence to the court which indicated that despite diligent, good faith efforts, it was unable to retain competent, local counsel for this matter. In fact, Tampam provided no evidence that it contacted more than one law firm to represent it in this matter.

Grasping for some type of rationale to justify its request for Attorney McMillen's fee, Tampam claims that much of his work was performed in Chicago and not in Ogle County; and, therefore, he should be compensated at his Chicago rates at least for the hours worked in Chicago. While no precedent exists which gives credence to such an argument, to adopt such a practice could lead to absurd results. Some attorneys from jurisdictions with relatively low prevailing rates may purposefully perform services in locales with higher rates just to increase their

compensation. In *Donnell*, the court held that where much of the work must be performed somewhere other than where the case is tried, that alone was insufficient to deviate from the rule that the *relevant* community for determination of rates of attorney compensation is the one in which the trial court sits. 682 F.2d at 251-252.

Logic and the persuasive reasoning of other jurisdictions which have addressed the issue indicate that even for McMillen's work in the Chicago area, Tampam should receive the forum rate of $95.00 per hour.

III. THIS COURT SHOULD DENY THE WRIT WHERE THE ILLINOIS COURTS PROPERLY REJECTED PLAINTIFF'S PETITION FOR A 50% UPWARD ENHANCEMENT AND PROPERLY DECIDED TO REDUCE THE MCMILLEN AND NYE LODESTARS TO REFLECT THE AMOUNTS INVOLVED AND THE RESULTS OBTAINED.

Tampam petitioned for a 50% upward enhancement of Attorney McMillen's lodestar due to the claimed unusual and difficult nature of this case and the results obtained in the settlement agreement. (R. C-290). An upward enhancement may be awarded in some cases where *exceptional success* has been achieved. *Hensley*, 461 U.S. at 435. (emphasis added). The fee applicant bears the burden of proving that such an enhancement is required to obtain a reasonable fee. *Blum*, 465 U.S. at 898. However, when determining whether to increase the lodestar, neither novelty, complexity, nor results obtained provides the basis for such an increase. These factors are generally subsumed within the other factors used to calculate the lodestar. *Id.* at 898-900.

In this case, the court found that the "exceptional success" requirement necessary for an upward enhancement was clearly absent. (R. C-384). Thus, the court properly exercised its discretion not to award the enhancement which Tampam requested.

In *Hensley*, the court adopted the 12 factors enumerated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), which provide a framework for trial courts to determine the reasonableness of a fee award pursuant to fee shifting statutes. *Hensley*, 461 U.S. at 429-430, at n.3. From the court's assessment of the case, it may exercise its discretion to reduce the lodestar based on one or more of the *Johnson* factors. *Lynch v. City of Milwaukee*, 747 F.2d 423, 429-430 (7th Cir. 1984). The court, when making an adjustment to the lodestar – either upward or downward – should make it clear that its decision is based upon the results obtained. *Hensley*, 461 U.S. at 437.

In Count I of Tampam's Second Amended Complaint, the Plaintiff enumerates its prayers for relief consisting of six paragraphs. (R. C-154, 158). Tampam was successful in obtaining the relief requested in paragraph 1 – that is, certification as the representative of the proposed class. However, Tampam was totally unsuccessful in obtaining any relief requested in paragraphs 2, 3 and 4. See Stipulation for Settlement (R. C-278-280) and Order Approving Stipulation for Settlement (R. C-281-284). Although the parties agreed that assessments on wasteland in Ogle County would be reduced to $1.00 per acre for 1988 and $0.00 per acre for 1989 and thereafter, Tampam did not obtain the specific relief requested in paragraph 5. Turning to the last paragraph of Count I, Tampam achieved

only partial relief, that being an award of reasonable attorneys' fees, costs and expenses. Therefore, Tampam only achieved status as the class representative, a reduction in the assessments on wasteland, and an award of reasonable attorneys' fees, costs and expenses.

As previously noted, the public roads issue was never viable under §1983 and not compensable pursuant to §1988. Additionally, Tampam abandoned the debasement claim for assessment of fields of irregular shape and size. (R. C-373). While Tampam now disputes that the debasement issue was abandoned, even if it was not abandoned, that issue remains for future negotiation or settlement and was not part of the relief for which Tampam should be compensated. Therefore, Tampam did not prevail on this claim.

The other part of the *Johnson* factor which was used by the court to reduce the lodestar is the "amounts involved". In the case at bar, the amount of taxes which was collected *annually* from all of the wasteland in the *entire* county was *less than* Two Thousand Four Hundred Dollars ($2,400.00). See Affidavit of James Harrison, Ogle County Supervisor of Assessments. (R. C-347). Since there are approximately 5500 parcels of land designated as farm parcels in Ogle County, this amounts to approximately 43 cents ($0.43) (i.e., $2,400 ÷ 5505) per parcel.

Any reduction in the lodestar should be for one of the enumerated factors expressed in *Johnson* and should be expressed in a dollar amount reflecting, as best as possible, the market value of the specific defect. *Lynch v. City of Milwaukee*, (7th Cir. 1984), 747 F. 2d 423, 430. In the case at bar, the court did this very thing.

An abuse of discretion occurs only when no reasonable person could take the view adopted by the trial court. *Lynch*, 747 F. 2d at 426. The trial court did not abuse its discretion in this case.

In this case, the only compensable claim was the wasteland challenge. Additionally, Tampam only achieved a very limited portion of the relief which it sought in Count I of the Second Amended Complaint. Applying this information to this case, the court reduced Attorney McMillen's lodestar by $3,000.00 and attorney Nye's by $800.00 to reflect the amount involved and the results obtained – one of the 12 *Johnson* factors. Thus, the court indicated that it had considered the results which Tampam obtained when it exercised its discretion to reduce the compensation for Attorneys Nye and McMillen.

Petitioner seems to believe that if this Court allows the lower court's decision to stand, or, in the alternative, if this Court grants the Writ but affirms the lower court's decision, then plaintiffs will not be able to select the counsel of their choice. This assertion is absolutely not true. A party can select any attorney it desires for representation; this interpretation for awarding attorneys' fees to prevailing plaintiffs pursuant to 42 U.S.C. §1988 only sets the standard for payment. " . . . it is no part of civil rights law to overcompensate successful plaintiffs" *Lenard*, 808 F. 2d at 1248.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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